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## Anti-Racketeering Legislation in America

"It appears that when the Congress does not seem to have anything else to do, we must meet here and make some more crimes."

— Statement of Congressman Young  
concerning the 1934 anti-racketeering legislation<sup>1</sup>

In 1983, President Ronald Reagan emphasized the importance of federal efforts to curb organized criminal activity, characterizing organized crime as "a continuing threat to the domestic security of our nation", and stating that organized crime "take[s] a tremendous toll on the criminal justice system and its resources."<sup>2</sup> To agree that a national problem of organized crime exists, however, is not necessarily to agree that the government's declarations as to its scope are accurate or that the methods used in fighting it are appropriate or effective. Like other social issues, organized crime is addressed to the extent that it is politically favorable, which is not necessarily an indicator of how great a threat the problem actually poses. In the last two decades, the volume and scope of legislation addressing organized crime has drastically decreased, with the most recent major legislation put into effect over fifteen years ago.<sup>3</sup> This decrease, however, may not reflect success in the federal efforts against racketeering and other forms of organized crime, but simply a realization by Congress and the executive that other issues hold more political value.

This article is about the methods of the American government in fighting organized crime. It traces the history of federal anti-racketeering legislation, beginning with Congress's ban on lotteries in the

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\* James Louis Calamaras, Professor of Law, Indiana University (Bloomington). This article is a condensed and updated version of *Racketeering and the Federalization of Crime*, 22 Am. Crim. L.R. 213 (1984). My thanks to Laura Jakubowski for her editorial and research assistance.

1. 78 Cong. Rec., 7967, 8138 (1934) (statement of Rep. Young).

2. Letter from President Reagan to Senator Thurmond (January 26, 1983), reprinted in *Organized Crime in America, Hearings Before the Comm. on the Judiciary, United States Senate*, 98th Cong., 1st Sess. 3 (1983) [hereinafter cited as *Organized Crime in America*].

3. Norman Abrams and Sara Sun Beale, *Federal Criminal Law and its Enforcement* 3d, at 515 (West Group, 2000) (West Publishing Company, 1986).

late nineteenth century. It follows the development of federal power through Prohibition, the Kefauver hearings and the Kennedy administration to the present—a time at which organized crime has been eclipsed by other threats. The article shows how the Justice Department and a compliant Congress have progressively increased the federal power to combat organized crime despite persistent doubts as to just what constitutes organized crime, what methods would be most effective in attacking it, and how useful the methods chosen actually have been. After a century of federal efforts to eliminate organized crime, the only certain result is that the federal bureaucracy dedicated to the elimination of the problem has grown exponentially.<sup>4</sup> As for organized crime itself, no one definitively knows what it is or how extensive its operations may be; consequently, attempting to assess its growth or diminution is pure speculation<sup>5</sup>

This article also discusses how the commerce clause has been eroded into near meaninglessness by the expansion of federal laws directed at organized crime, demonstrating the power of the organized crime issue as a political weapon. The growth of federal power in this area may be regarded as a paradigm for the growth of federal governmental power in other areas, most recently in the government's efforts to protect the country from terrorism. The vitality of an establishment created to deal with a particular problem depends upon the continued existence, and even growth, of the problem. The perception of an ever-growing threat of crime, terrorism, or any other problem, is the lifeblood of the establishments set up to combat these problems.

### I. THE EARLY LEGISLATION

While organized criminal activity in America is undoubtedly as old as America itself,<sup>6</sup> the notion that the federal government ought to do anything about it is relatively recent. What might be considered the first federal organized crime legislation dealt with something which originally was not only legal but also a vital source of public revenue in eighteenth and early nineteenth century America — the

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4. The FBI has grown from 239 employees in 1925, to 10,291 in 1950, and to 19,738 in 1980. See Federal Budget Hearings for FYs 1927, 1952 and 1982 respectively. On the FBI's 96- year anniversary, in July of 2004, the organization had over 28,000 employees. At [www.fbi.gov/fbihistory.htm](http://www.fbi.gov/fbihistory.htm).

5. Compare 78 CONG. REC. 451(1934) (estimate that organized crime netted \$13 billion per year) with Miller, *A Federal Viewpoint on Combating Organized Crime*, 347 ANNALS 93, 94 (1963) (1961 estimate that organized crime netted \$22 billion per year). In 2004, the Center for Strategic and International Studies' Global Organized Crime Project estimated that the global profits of organized crime exceeded \$1 trillion per year.

6. See Tyler, *An Interdisciplinary Attack on Organized Crime*, 347 ANNALS 104, 107 (1963) (early settlers were plagued by pirates who sailed up navigable rivers of eastern seaboard and plundered plantations and villages).

lottery. Lotteries enjoyed widespread popularity throughout the first century of the country's existence and were used frequently by states and universities to finance worthwhile projects.<sup>7</sup> Mismanagement and dishonesty on the part of the organizers, combined with social concerns about the lottery's negative effects, however, led to increasing public opposition to lotteries,<sup>8</sup> and by 1878 they were illegal in most states.<sup>9</sup>

Despite state regulation and popular opposition elsewhere, the Louisiana lottery continued to flourish, flouting the laws of the other states by selling chances through the mails.<sup>10</sup> To deal with this problem, Congress passed a series of laws, ostensibly through its power to regulate interstate commerce. This legislation began with regulation of lottery materials sent through the mail, and culminated in a law which prohibited any person from bringing materials related to the lottery into the United States, or carrying them from state to state, by any means.<sup>11</sup> In 1899 the Supreme Court affirmed Congress's power to regulate in this way, upholding the conviction of C.F. Champion for conspiracy to deposit a batch of lottery tickets for interstate shipment.<sup>12</sup> The majority opinion in *Champion v. Ames* is laced with the same moralistic view of lotteries which had influenced Congress, concluding that "we should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end, Congress."<sup>13</sup>

Two aspects of this opinion are noteworthy. First, this decision was the first to recognize federal power under the Commerce Clause for the purpose of promoting public morals, which created a new federal police power that was the basis for future legislation aimed at organized criminal activity. Still, as broad as *Champion* was, it was limited to actual interstate (or international) shipment of materials.

Second, the fundamental assumption upon which the legislation and the Supreme Court decision were based — that Congress was "the only power competent"<sup>14</sup> to deal with the problem — was certainly erroneous. It was not the *inability* of the states to act but their *unwillingness*, for whatever reasons, which led to the federal action to eradicate what was perceived by the federal authorities as a moral

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7. J. EZELL, *FORTUNE'S MERRY WHEEL, THE LOTTERY IN AMERICA* 64, 71 (1960).

8. *Id.* at 107; *Id.* at 205.

9. *Id.* at 249; *Stone v. Mississippi*, 101 U.S. 814 (1879). (Mississippi's ban on lotteries upheld as exercise of police power).

10. J. EZELL *supra* note 6, at 247-49. *See also* Alwes, *The History of the Louisiana Lottery Company*, 27 LA. HIST. Q. 964, 973-74 (1944).

11. Act of March 2, 1895, ch. 191, § 85, 28 Stat. 963 (1895) [codified as amended at 18 U.S.C. § 1301 (1948)].

12. *Champion v. Ames*, 188 U.S. 321 (1903).

13. *Id.* at 357-58.

14. *Id.* at 357.

wrong, *not* as a threat to commerce. This is a theme which will be constantly repeated in the legislation discussed in this article.

No sooner had the scourge of lotteries been supposedly eradicated by federal legislation than another issue sprang to the forefront of political and popular attention. It was a significant problem around the turn of the century that young women, from rural America and from foreign countries, came to large American cities and for want of any alternative means of livelihood, turned to a life of prostitution. There was no question but that these houses of prostitution existed at the sufferance of the local police.

A combination of xenophobic fear of undesirable aliens,<sup>15</sup> Victorian revulsion against the immoral practice of prostitution, and, to a lesser extent, genuine concern for the welfare of the women<sup>16</sup>, created a strong public reaction against prostitution. Congress, along with the rest of the country, believed that there was "an *organized system or syndicate* having for its purpose the importation of women from foreign countries to. . . the United States for immoral purposes."<sup>17</sup> In 1875, acting under its power to regulate immigration,<sup>18</sup> Congress enacted a statute which forbade the "importation into the United States of women for the purpose of prostitution."<sup>19</sup> In 1907, Congress went even further, imposing criminal penalties on any person who kept a woman for prostitution during the three years after her entrance into the country.<sup>20</sup>

After the Supreme Court held the latter statute unconstitutional as not within the scope of Congress's power to regulate immigration,<sup>21</sup> Congress was forced again to turn to the commerce clause. Cong. Mann introduced a bill "prohibiting the transportation [in interstate commerce] for immoral purposes of women and girls."<sup>22</sup> The House Report accompanying the bill rather clearly indicated that the interstate travel aspect of the bill was added simply to fit it within the new federal jurisdiction established by *Champion v. Ames* rather than because interstate travel was essential to the offense.<sup>23</sup> Not only was interstate travel not an essential part of the prostitution

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15. See F. CORDASCO, *The White Slave Trade and the Immigrants* 26 (1981).

16. *E.g.*, The Women's Christian Temperance Union expanded their concerns to include lobbying for the welfare of these unfortunate women. *Id.* at 3.

17. H.R. REP. NO. 47, 61st Cong., 2d Sess. 12 (1901) (emphasis added).

18. See U.S. CONST. art. I, § 9, cl. 1 (limiting Congress' power to restrict immigration prior to year 1808); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 289 (1904).

19. Act of March 3, 1875, ch. 141, § 3, 18 Stat. 477 (1875). This was superseded by the Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213 (1903), which was to the same effect.

20. Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 89 (1907).

21. *Keller v. United States*, 213 U.S. 138, 144 (1909).

22. H.R. 12315, 61st Cong., 2d Sess. (1910). The bill was enacted June 25, 1910, ch. 395, 36 Stat. 825-27 (codified as amended at 18 U.S.C. §§ 2421-2424).

23. H.R. REP. NO. 47, *supra* note 16, at 4, 6-8.

business, but the Act was essentially a regulation of the private activity of individuals, and there was little evidence to suggest that forbidding interstate travel to prostitutes would have the effect of eliminating prostitution. Thus, as was to become the pattern in later years, the Act provided federal jurisdiction to demonstrate that Congress was *doing something* about the problem, even though the problem was not in fact amenable to solution at the federal level. This statute represented a further extension of federal power into an area where federal action was not necessary to effective enforcement, but was simply desired because the states were not doing the job. The Supreme Court unanimously upheld the statute in *Hoke v. United States*.<sup>24</sup>

Similarly, with the National Motor Vehicle Theft Act, popularly known as the Dyer Act,<sup>25</sup> Congress once again turned to the Commerce Clause in order to use the interstate aspect of crime as the basis for federal jurisdiction. The Dyer Act prohibited the transportation in interstate or foreign commerce of a motor vehicle by anyone who knew the same to be stolen.<sup>26</sup> The Dyer Act was not aimed at solving problems of detection or apprehension,<sup>27</sup> but rather for the "purpose of giving some jurisdictional authority to bring witnesses from one state to another."<sup>28</sup> If authority to transport witnesses was the end sought, a more obvious means to it would have been simply to promote an interstate compact on witnesses. The Dyer Act did not break any new ground in the development of the jurisdictional authority of the federal government, but it proved to be vital in the exercise of that authority. Despite the fact that detection and recovery of stolen vehicles remained overwhelmingly the province of state and local police, *prosecution* of those offenses was virtually completely taken over by the federal government<sup>29</sup> in order to improve FBI conviction statistics.

## II. PROHIBITION AND REACTION

The wave of moralism that led Congress to outlaw prostitution in 1909 gained momentum in the second decade of the century. The statutes spawned by this attempt to legislate morality were not aimed at organized crime, however, but rather at the disorganized use of narcotic drugs and liquor by the general population. Measures banning the importation of opium and statutes that by implication

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24. 227 U.S. 308(1913).

25. Act of October 29, 1919, ch. 89, 41 Stat. 324 (1919) (codified as amended at 18 U.S.C. § 2312 (1979)).

26. *Id.*

27. 58 CONG. REC. 5474 (1919).

28. *Id.*

29. For example, the FBI Annual Report for 1937-38 reported 5420 convictions. Of these reported convictions, 2093 were for vehicle theft.

criminalized narcotics use and distribution created a fertile field for organized criminal endeavor.<sup>30</sup> The National Prohibition (Volstead) Act added to this problem to an even greater degree.<sup>31</sup> Overnight the legitimate brewing and distilling industry was declared illegal while demand, piqued because alcohol had become a forbidden fruit, greatly increased. By necessity, this demand was now met by criminals—either the former legitimate producers operating illegally or bands of gangsters and thugs.

While America had organized crime before prohibition, it was more diverse, loosely structured, and primarily involved with prostitution, gambling and political corruption on a local level. These activities did not require large organizations. In contrast, prohibition created a need for large-scale distribution networks comprising smugglers, distillers, bottlers, warehouses and trucks as well as numerous retailing outlets. Thus, organized crime, as we know it today, was born—the unwanted child of an unfortunate act of Congress. As the gangsters gained strength, entire towns were taken over.<sup>32</sup> Local police forces were rendered ineffective by widespread public flouting of the laws and millions paid in bribes by gangsters, in the face of which Washington was quiescent.

Immediately prior to the repeal of the Prohibition Act on December 5, 1933,<sup>33</sup> crime seemed to run rampant. Cities such as Chicago and Detroit were in the grip of gangsters, and murders of police and federal agents, as well as gang figures, were commonplace.<sup>34</sup> It got worse. With the onset of the Depression and the imminent demise of prohibition, falling liquor profits forced the gang leaders to find other outlets for the energies of their violent henchmen. Mobsters began to move into other previously untapped areas such as extortion from legitimate business and labor racketeering.<sup>35</sup> At the same time, a wave of kidnapping and bank robberies terrorized the country.<sup>36</sup>

Obviously, there was political capital to be made from attacking crime. The first volley fired from Washington was the Federal Kidnapping Act,<sup>37</sup> introduced as a measure aimed at the depredations of

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30. R. Bonnie & C. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 Va. L. Rev. 971, 1080 (1970).

31. National Prohibition Act, ch. 83, 41 Stat. 305 (1919). The Act provided for the manufacture of industrial alcohol by permits, banned the use of beverage alcohol, and charged the Commissioner of Internal Revenue with enforcement of the Act.

32. H. ABADINSKY, *ORGANIZED CRIME* 80-81 (1969) (describes how Capone mob took over Cicero, IL in 1924).

33. U.S. CONST. amend. XXI.

34. H. ABADINSKY, *supra* note 31, at 72, 84.

35. *Id.* at p. 84.

36. Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROBS. 400 (1934).

37. Federal Kidnapping Act, ch. 271, 47 Stat. 326 (1932) [codified as amended at 18 U.S.C. § 1201 (1979)].

organized crime<sup>38</sup> and passed in the furor surrounding the kidnapping of the Lindbergh baby.<sup>39</sup> Despite protests from the House Judiciary Committee that the bill was an unnecessary intrusion on the police authority of the states,<sup>40</sup> the Federal Kidnapping Act was enacted on June 22, 1932, making interstate transportation of a kidnapped victim a federal offense subject to life imprisonment.

In the summer and fall of 1933, a subcommittee of the Commerce Committee held hearings around the country on the subject of organized crime. With the exception of Assistant Attorney General Keenan, the overwhelming sentiment of the witnesses, federal and state officials alike, was that crime should be dealt with by state, not federal authorities.<sup>41</sup> However, because deferring to the states meant that Congress would have nothing to show for the hearing, it is hardly surprising that despite the opinion of the witnesses, thirteen major bills were introduced in January of 1934. The important measures which were enacted expanded the coverage of the Lindbergh Law,<sup>42</sup> forbade interference with interstate commerce by threats, force or violence,<sup>43</sup> extended the Dyer Act to cover interstate transportation of all stolen property worth more than \$5,000,<sup>44</sup> forbade interstate flight to avoid prosecution or testimony,<sup>45</sup> and regulated the sales and shipment of firearms.<sup>46</sup> Later bills in the same session added bank robbery<sup>47</sup> and assault on a federal officer to the list of federal crimes.<sup>48</sup>

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38. See, 75 Cong. Rec. 13, 284 (1932) (Remarks of Cong. Cochran).

39. In December, 1931, S. 1525, 75 CONG. REC. 275 (1931), was introduced in the Senate and H.R. 5657, 75 CONG. REC. 491 (1931), in the House. Finley, *The Lindbergh Law*, 28 Geo. L.J. 908, 909-10 (1940). The Lindbergh baby was kidnapped on March 2, 1932. *Id.* at 910.

40. 75 CONG. REC. 13, 291-92.

41. E.g., George Z. Medalie, United States Attorney for the Southern District of New York, testified: "whenever the Federal Government acts, the local authorities practically abdicate their power. . . . [T]he more power you take away from localities, the less able will be the localities to function." *Investigation of So-Called Rackets: Hearings Before a Subcomm. of the Comm. On Commerce*, United States Senate, 73rd Cong. 2d Sess. 83-84 (1933).

42. S. 2252, 73d Cong., 2d Sess. (1934).

43. Act of June 18, 1934, ch. 569, 48 Stat. 979 (1934) (originally proposed as S. 2248, 73d Cong., 2d Sess. (1934)), *as amended*, 18 U.S.C. § 1951 (1976).

44. Act of May 22, 1948, ch. 333, 48 Stat. 794 (originally proposed as S. 2845, 73d Cong., 2d Sess. (1934)), *as amended*, 18 U.S.C. § 2314(1976). The primary purpose of this bill was to bring bank robbery within federal jurisdiction. 78 CONG. REC. at 452 (remarks of Senator Vandenberg).

45. Act of May 18, 1934, ch. 302, 48 Stat. 782 (1934) (originally proposed as S. 2253, 73d Cong., 2d Sess. (1934)), *as amended*, 18 U.S.C. § 1073 (1976).

46. Act of June 26, 1934, ch. 757, 48 Stat. 1236 (1934) (originally proposed as H.R. 9741, 73d Cong., 2d Sess. (1934)), *as amended*, 26 U.S.C. § 5841(1976).

47. Act of May 18, 1934, ch. 304, 48 Stat. 783 (1934) (originally proposed as S. 2841, 73d Cong., 2d Sess. (1934)), *as amended*, 18 U.S.C. § 2113 (1976).

48. Act of May 18, 1934, ch. 299, 48 Stat. 780 (1934) (originally proposed as S. 2080, 73d Cong., 2d Sess. (1934)), *as amended*, 18 U.S.C. § 2113 (1976).



Passed for the most part in a flurry of patriotic fervor, the most striking feature of these bills was simply their volume.<sup>49</sup> Two of the bills, however, contained features which also significantly broadened the legal basis for federal jurisdiction. All of the earlier legislation and most of the 1934 acts required actual participation in commerce — either interstate travel or use of a facility of interstate commerce. The Anti-Racketeering Act, however, claimed federal jurisdiction when the crime is “in connection with or in relation to any act in any way or degree affecting” interstate or foreign commerce.<sup>50</sup> A contemporary commentator argued that the reason this Act was so broad is the fact that the activities of racketeers are primarily local.<sup>51</sup> The very fact that racketeering did *not* have much impact on interstate commerce led Congress to enact this very broad statute in order to assert federal jurisdiction.

The second significant extension of federal jurisdictional authority among these bills occurred in the amendment to the Lindbergh Law which created a rebuttable presumption of interstate travel after seven days.<sup>52</sup> The purpose of this presumption was to allow the Division of Investigation (later the FBI) to get into cases before the “clues [were] cold.”<sup>53</sup> Although the government repeatedly used this presumption to establish federal investigative jurisdiction, they usually have not relied on it at trial, turning all non-interstate cases over to local authorities for prosecution.<sup>54</sup> In 1977, however, the government made the mistake of relying on the presumption at trial, and the court of appeals struck it down as unconstitutional.<sup>55</sup>

### III. THE KEFAUVER ERA

In the late 1930's the war on crime appeared to be succeeding, with the convictions of Al Capone,<sup>56</sup> notorious bank robber Alvin Karpis,<sup>57</sup> and the indictment of seventy-three racketeering figures in 1935-36.<sup>58</sup> New York authorities also successfully prosecuted, and ex-

49. PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON CRIME 332 (1934) (remarks of Assistant Attorney General Keenan). This increase in the number of federal laws promptly led to a proposal that the size of the FBI must be tripled. Moley, *Report to President Roosevelt*, reprinted in N.Y. Times, May 24, 1934, § 1, at 2.

50. Ch. 569, 48 Stat. 979 (1934); 18 U.S.C. §§ 421-25 (Supp. 1934), *as amended*, 18 U.S.C. § 2951 (1976) (emphasis added).

51. Note, *Racketeering. Bank Robbery and Kickback Laws*, 1 LAW & CONTEMP. PROBS. 445, 447 (1934) (emphasis in original) (citations omitted).

52. 48 Stat. 781 (1934).

53. 78 CONG. REC. 453 (1934) (Remarks of Senator Copeland).

54. Bomar, *The Lindbergh Law*, 1 LAW & CONTEMP. PROBS. 435, 443 (1934).

55. *United States v. Moore*, 571 F.2d 76, 82-83 (2d Cir. 1978).

56. J. KOBLER, *Capone*, 341-43 (1971).

57. A. MILLSPAUGH, *CRIME CONTROL BY THE NATIONAL GOVERNMENT* 104-05 (1937).

58. W. MOORE, *THE KEFAUVER COMMITTEE AND THE POLITICS OF CRIME 1950-52* 17 (1974).

ecuted, the leading mob figure, Louis "Lepke" Buchalter, along with other members of the "Murder, Inc." conspiracy.<sup>59</sup> Congressional concern with the crime problem diminished and then disappeared altogether when World War II took over the headlines.<sup>60</sup> After the war, however, the crime issue resurfaced. J. Edgar Hoover released statistics showing a 12.4% increase in crime in 1945 and a further 7.6% jump the next year.<sup>61</sup> It was said that in Chicago the Capone mob was resurging<sup>62</sup> and in New York, Frank Costello rated stories in *Time* and *Newsweek* as the elder statesman of the underworld.<sup>63</sup> The "subtle black stain of a hoodlum super-government" was said to be spreading over the country.<sup>64</sup>

In this atmosphere of renewed hysteria over the problem of organized crime, the government felt compelled to act. An ambitious junior Senator from Tennessee, Estes Kefauver, introduced Senate Resolution 202<sup>65</sup> on January 5, 1950, to empower his Judiciary Committee to investigate "interstate gambling and racketeering."<sup>66</sup> After considerable jockeying for position among other representatives and senators who wanted a piece of the organized crime issue,<sup>67</sup> the resolution was approved on May 3, 1950.<sup>68</sup> The Kefauver Committee held hearings around the country in cities such as Detroit, New Orleans and St. Louis.<sup>69</sup> The hearings culminated in March of 1951 with a nationally televised presentation in New York featuring Frank Costello. Costello confirmed the public image of the prototypical murderous Italian mobster as he tried to evade the Committee's questions.<sup>70</sup> The impact of the hearings was to convince the public that there was a "nationwide crime syndicate" which profited greatly from gambling revenues and maintained its position through "persuasion, intimidation, violence, and murder."<sup>71</sup>

The Committee also introduced a score of legislative proposals which sought to cut down the influence of organized crime by limiting

59. A. TULLY, *Treasury Agent* (1958) in ORGANIZED CRIME IN AMERICA 205 (G. Tyler, ed. 1962).

60. See CONGRESSIONAL RECORD INDEX, 1935-1950 (showing virtually no legislative activity relating to crime).

61. Hoover, *The Rising Crime Wave*, AM. MAG. 124-28 (Mar. 1946).

62. W. MOORE, *supra* note 57, at 26.

63. TIME, Oct. 17, 1949, at 27; NEWSWEEK, Nov. 21, 1949, at 33. See also Asbury, *America's Number 1 Mystery Man*, COLLIERS, Apr. 12, 1947 and Apr. 19, 1947.

64. B. Considine, *Hoodlum Empire*, International News Service, Feb. 13, 1950. Quoted in 96 Cong. Record 1502 (1950).

65. S. Res. 202, 81st Cong., 1st Sess. (1950).

66. 96 CONG. REC. 67 (1950).

67. W. MOORE, *supra* note 57, at 49-63.

68. S. Res. 202, *supra* note 63.

69. See W. MOORE, *supra* note 57, at 183.

70. *Id.* at 189.

71. S. REP. NO. 307, 82d Cong., 1st Sess. 150 (1951) (THE THIRD INTERIM REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE).

narcotics<sup>72</sup> and illegal liquor traffic,<sup>73</sup> "liberaliz[ing] the process of deportation of criminals,"<sup>74</sup> and giving the Justice Department the power to immunize witnesses.<sup>75</sup> The "keystone"<sup>76</sup> of the Committee's proposals was three bills designed to "strike at" and "cripple" organized crime by barring gamblers from using interstate telegraph facilities.<sup>77</sup> Although none of these bills passed,<sup>78</sup> the Kefauver extravaganza seemed to sate the public and congressional appetite for crime. Only two statutes, the Wagering Tax Act<sup>79</sup> and the Narcotic Control Act,<sup>80</sup> were passed over the next few years.

After a seven-year hiatus, public interest in organized crime was restimulated in November of 1957 when New York State Police arrested sixty-three organized crime figures from across the nation.<sup>81</sup> Shortly thereafter, the Senate Select Committee on Improper Activities in the Labor and Management Field (McClellan Committee) held hearings that exposed the corruption of many unions, especially the Teamsters, and their close connection with organized crime.<sup>82</sup> In the Justice Department, Attorney General Rogers reported "substantial and continuing success" against organized crime.<sup>83</sup> He predicted the continued decline of organized crime, noting that "[T]he federal government has a number of powerful weapons that it can use in this

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72. S. 1695, 82d Cong., 1st Sess. (1951) (increased penalties for certain narcotics violations) and S. 1900, 82d Cong., 1st Sess. (1951) (same). *See* S. REP. NO. 725, 82d Cong., 1st Sess. 90 (1951) (THE FINAL REPORT OF THE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE) [hereinafter cited as THE FINAL REPORT OF THE KEFAUVER COMM.].

73. S. 1530, 82d Cong., 1st Sess. (1951) (designed to make it more difficult to import bootleg liquor into dry states), S. 1663, 82d Cong., 1st Sess. (1951) (same), and S. 2062, 82d Cong., 1st Sess. (1951) (same). *See* THE FINAL REPORT OF THE KEFAUVER COMM., *supra* note 69, at 91.

74. S. Rep. No. 725, 82d Cong., 1st Sess. 92 (1951) (THE FINAL REPORT OF THE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE) [hereinafter cited as THE FINAL REPORT OF THE KEFAUVER COMM.]. The Committee had found that "a number of important criminals. . . had entered the United States illegally." *Id.*

75. S. 1747, 82d Cong., 1st Sess. (1951). *See* THE FINAL REPORT OF THE KEFAUVER COMM., *supra* note 73, at 94.

76. 97 CONG. REC. 12968 (1951) (remarks of Senator O'Connor).

77. S. J. Res. 65, 81st Cong., 2d Sess. (1951). *See* THE FINAL REPORT OF THE KEFAUVER COMM. *supra* note 74, at 96.

78. 97 CONG. REC. 12968, 6640, 8807, 5664, 6457, 10680, 5664, 7015 (1950).

79. Revenue Act of 1951, Pub. L. No. 183, §§ 463, 471, 65 Stat. 452 (1951). This statute was struck down by the Supreme Court in *Marchetti v. United States*, 390 U.S. 39, 60 (1968); *Grosso v. United States*, 390 U.S. 62, 71 (1968).

80. Narcotic Control Act of 1956, ch. 629, § 7237, 70 Stat. 568 (1956), *as amended*, 26 U.S.C. § 7237 and 21 U.S.C. §§ 174, 176a, 184a (1956). For a full discussion of the history of federal narcotics legislation, see Bonnie & Whitebread, *supra* note 29.

81. H. ABADINSKY, *supra* note 31, at 11.

82. S. REP. NO. 1417, 85th Cong., 2d Sess. (1958) (FIRST INTERIM REPORT OF THE SELECT COMM. ON IMPROPER ACTIVITIES IN LABOR OR MANAGEMENT FIELD). *E.g.*, "The Committee finds that the New York garbage-collecting industry has been infiltrated and dominated by criminals including the Mafia." *Id.* at 327.

83. Rogers, *The New War on Organized Crime*. PARADE MAGAZINE, Feb. 7, 1960, quoted in 106 CONG. REC. 2159 (1960).

battle against syndicated crime. And today the criminal is faced by a formidable alliance of State and Federal officers."<sup>84</sup>

#### IV. THE ERA OF ACTIVISM

Yet one year later, to hear new Attorney General Robert Kennedy tell it, this "formidable alliance" had abandoned the field in disarray. Kennedy claimed that "the situation is worse than it was 10 years ago in terms of the financial power of the racketeers, the extent of their operations, the number of people involved and their political power."<sup>85</sup> Kennedy proposed several federal statutes.<sup>86</sup> These proposals prohibited interstate travel in aid of racketeering (ITAR),<sup>87</sup> expanded the fugitive felon law to cover all felonies,<sup>88</sup> forbade the use of interstate communication facilities for gambling purposes,<sup>89</sup> prohibited interstate shipment of materials and machines used in gambling,<sup>90</sup> expanded the immunity statute to apply to labor investigations,<sup>91</sup> and offered expanded protection to witnesses during the investigatory stage of the criminal process.<sup>92</sup> All of these were enacted, except the immunity and witness protection proposals, albeit in slightly less ambitious forms than originally proposed. Kennedy promised that denying the use of the nation's communications system to gamblers, which the proposed legislation would supposedly accomplish, "would be a mortal blow to their operations."<sup>93</sup>

ITAR, which Kennedy termed "the most controversial of the bills,"<sup>94</sup> was the most significant both in terms of expansion of federal jurisdiction and subsequent use by the government as a prosecutorial tool. As usual, the explanations of the need for the statute—to fill "a hole in the criminal laws of the United States,"<sup>95</sup>—were spurious. In the first place, the problem could be easily addressed by other new,

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84. ORGANIZED CRIME AND LAW ENFORCEMENT: REPORT OF THE ABA COMMISSION ON ORGANIZED CRIME (M. Ploscow, ed., 1953), 221-22, plus parenthetical comment.

85. Washington Star, Aug. 13, 1961 (speech by Robert Kennedy), reprinted in 107 CONG. REC. 6414 app. (1961).

86. For a detailed but uncritical discussion of these and the other anti-gambling statutes, see Blakely and Kurkland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923 (1978).

87. Pub. L. No. 87-228, 75 Stat. 498 (1961). Currently 18 U.S.C. § 1952.

88. Pub. L. No. 87-368, 75 Stat. 795 (1961).

89. Pub. L. No. 87-216, 75 Stat. 491 (1961).

90. Pub. L. No. 87-218, 75 Stat. 491 (1961), and Pub. L. No. 87-840, 76 Stat. 1075 (1961).

91. S. 1665, 87th Cong., 1st Sess. (1961).

92. *Id.*

93. Washington Star, supra n. 84.

94. *Hearings before the Senate Committee on the Judiciary: The Attorney General's Program to Curb Organized Crime and Racketeering*, 87th Cong., 1st Sess. 15 (1961) [hereinafter cited as *Senate Hearings*].

95. *Legislation Relating to Organized Crime: Hearings before Subcomm. Of the House Comm. On the Judiciary*, 87th Cong., 1st Sess. 103 (1961) (testimony of Assistant Attorney General Herbert J. Miller).

gambling specific, legislation that had already been enacted.<sup>96</sup> Moreover, had the states really wished to prevent gambling, they could have done so by their own regulation. They had not done so, of course, because in their hearts, most citizens at least tolerated such organized criminal activities.<sup>97</sup>

Aside from the arguably unnecessary expansion of the federal government's commerce power, ITAR is an extremely broad statute.<sup>98</sup> It is limited to neither travel, racketeering, nor a continuous course of conduct, and the possibilities are endless for creative federal prosecution of people who are not "interstate racketeers" by any definition. Indeed, ITAR has repeatedly been used to prosecute purely local gambling operations.<sup>99</sup> This is not a surprising result from Justice Department attorneys, who should be expected to push their statutory authority to the limit in order to make their cases.

In the next two years the Attorney General sought even greater authority from Congress, informing the Senate of the existence of "a private government of organized crime, a government with an annual income of billions, resting on a base of human suffering and moral corrosion . . . Organized crime has grown immensely since the days of the Kefauver hearings."<sup>100</sup> Accordingly, the Justice Department proposed legislation to expand the immunity power<sup>101</sup> and to give the Department the power to conduct wiretaps in certain particularly serious cases such as kidnapping and murder.<sup>102</sup> In order to drum up enthusiasm for the bills, the Justice Department, in the autumn of 1963, produced Mafioso Joseph Valachi, who regaled the Committee with tales of blood rites, murders, and the code of *omerta*, and added

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96. S. 1656, 87th Cong., 1st Sess. 107 (1961) (prohibiting the use of the telephone in interstate gambling) and S. 1657, 87th Cong., 1st Sess. (1961).

97. For example, "an aroused citizenry" cleaned up Beaumont, Texas, a town previously "controlled" by organized crime. *Senate Hearings*, *supra* note 93, at 2.

98. One problem with ITAR is that it arguably interferes with the constitutional right to travel. *See. e.g.*, *United States v. Guest*, 383 U.S. 745 (1966) (recognizing right to travel as fundamental constitutional right).

99. *See e.g.* *United States v. Erlenbaugh*, 452 F.2d 967 (7th Cir. 1967), *aff'd on other grounds*, 409 U.S. 239 (1972); *United States v. Carpenter*, 392 F.2d 205 (6th Cir. 1968) (interstate travel falls under statute even if trips out of state have no connection to illegal activities).

100. *Hearings Before the Permanent Subcomm. on Investigation of the Senate Comm. on Government Operations. Organized Crime and Illicit Traffic in Narcotics*, 88th Cong., 1st Sess. 6-19(1963) (emphasis added) [hereinafter cited as *Narcotics Hearing*].

101. *Id.* at 15 (asking for authority to provide immunity to witnesses in racketeering investigations).

102. This bill was originally submitted as S. 2813, 87th Cong., 2d Sess. (1962) (later it became S. 1308, 89th Cong., 1st Sess. (1963)). As originally introduced, the bill forbade wiretapping by private individuals, but allowed it for state and federal authorities in national security, murder, kidnapping, extortion, bribery, illegal transmissions of wagering information, ITAR and narcotics cases. *Narcotics Hearings*, *supra* note 100, at 3. The authority was limited to "interception of wire communications." *Id.*

*La Cosa Nostra* to the organized crime lexicon.<sup>103</sup> With the assassination of President Kennedy in November of 1963, however, his brother lost both political power and his enthusiasm for the anti-racketeering campaign,<sup>104</sup> and the legislation died in committee.<sup>105</sup>

Still, the spark had been lit. In 1965, President Johnson appointed a commission, headed by Attorney General Katzenbach to study the organized crime problem.<sup>106</sup> The Task Force concluded that organized crime, with extensive operations in the fields of gambling, loan sharking, and narcotics, as well as infiltration of legitimate business and labor unions, posed a massive national problem<sup>107</sup> and recommended *inter alia* that Congress enact wiretapping and eavesdropping legislation. This report, combined with the Supreme Court's decision in *Berger v. New York*<sup>108</sup> and the support of the FBI and the Internal Revenue Service, led Congress to introduce a resurrection of the Justice Department's 1962 wiretapping bill. Also introduced at the same time was a bill that allowed both wiretapping and electronic eavesdropping by federal and state authorities in certain cases.<sup>109</sup> After considerable manipulation on the part of its sponsors the bill was enacted,<sup>110</sup> five years after it had originally been proposed by the Justice Department.

The wisdom and the constitutionality of the wiretapping laws has been amply debated<sup>111</sup> and litigated.<sup>112</sup> With the enactment of

103. *Id.* at 80.

104. See V. NAVASKY, *Kennedy Justice* 51-52 (1971).

105. A vote was never held in committee. 109 CONG. REC. PROCEEDINGS DEBATES OF THE 88TH Cong., 1st Sess. (1963) and 110 CONG. REC. PROCEEDINGS AND DEBATES OF THE 88TH Cong., 2d Sess. (1964). Despite the absence of statutory authority, the FBI used wiretapping extensively anyway. V. Navasky, *supra* n.103 at 66-67.

106. PRESIDENT'S MESSAGE TO CONGRESS, H.R. Doc. No. 103, 89th Cong., 1st Sess. 4 (1965).

107. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME IN AMERICA 2-4 (1967).

108. 388 U.S. 41 (1967). In *Berger*, the Court struck down a state conviction based on electronic eavesdropping evidence which was obtained pursuant to a statute which did not require a showing of probable cause or particularity for the authorities to obtain an eavesdropping order from the court. *Id.* at 55.

109. *Bills Relating to Crime Syndicates, Wiretapping, Admissibility in Evidence of Confessions, Assisting State and Local Governments in Combating Crime and Related Areas of Criminal Law and Procedures Before the Subcomm. On Criminal Laws and Procedures of the senate Comm. On the Judiciary*, 90th Cong., 1st Sess. 1005 (1967).

110. Pub. L. No. 90-351, 82 Stat. 197 (Title III is codified as amended at 18 U.S.C. §§ 2510-2520).

111. See ELECTRONIC SURVEILLANCE: REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO ELECTRONIC SURVEILLANCE (1976) [hereinafter cited as NATIONAL WIRETAP COMMISSION].

112. See, e.g., *United States v. Cafero*, 473 F.2d 489 (3d Cir. 1973) (upholding constitutionality of Title III despite earlier holding of unconstitutionality by district court in same circuit), *cert. denied*, 417 U.S. 918 (1974); *United States v. Whitaker*, 343 F. Supp. 358 (E.D. Pa. 1972), *rev'd*, 474 F.2d 1246, *cert. denied*, 412 U.S. 953 (1973); *United States v. United States District Court*, 407 U.S. 297 (1972) (holding that "national security" wiretaps must conform to fourth amendment warrant requirements (though 18 U.S.C. § 2511(2)(e)-(f) had specified that Act was not intended to limit or

these bills, the national fear of organized crime had placed by far the most powerful tool yet in the hands of law enforcement authorities and, as in the past, that tool was not limited to use in organized crime investigations. However, the requirements that the Attorney General or a designated Assistant Attorney General must approve the tap or eavesdrop and that the judge must find that "normal investigative procedures have been tried and have failed" (or are likely to fail)<sup>113</sup> may serve to curb investigative zeal.<sup>114</sup>

A further legislative development in 1968 that established yet another new jurisdictional beachhead for the federal government was the extortionate credit transactions (loan-sharking) provision, Title II of the Consumer Credit Protection Act of 1968.<sup>115</sup> As originally introduced, the Consumer Credit Protection bills contained no provisions relating to loan-sharking.<sup>116</sup> The provisions were inserted at the instigation of Congressmen Poff of Virginia and McDade of Pennsylvania with the "cooperation" of the Justice Department.<sup>117</sup> Because this Act incorporated a congressional finding that *all* loan-sharking transactions affected interstate commerce, the statute did not require that a particular transaction specifically involve interstate commerce at all.<sup>118</sup> The only information that could conceivably justify this blanket conclusion of an effect on interstate commerce is the finding that "organized crime takes \$350 million a year from America's poor through loan-sharking alone."<sup>119</sup> It was this finding as well as congressional discussion of a New York Times article (discussing how loan-sharking is used to "launder" organized crime's ill-gotten gains)<sup>120</sup> which led the Supreme Court in *Perez v. United States* to uphold the statute against a challenge based on the Commerce Clause.<sup>121</sup> This conclusion, however, is highly questionable in many cases. It ignores that fact that loan-sharking can be, and usu-

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define President's traditional power to wiretap in order to prevent overthrow of government)); *United States v. Chavez*, 416 U.S. 562 (1974) (holding that 18 U.S.C. § 2516(1) limits power to authorize wiretap applications to Attorney General or any Assistant Attorney General he might designate); *United States v. Giordano*, 416 U.S. 505 (1974) (same).

113. 18 U.S.C. § 2516(1) (1982) & § 2518(3)(c) (1982).

114. According to the National Wiretap Commission, *supra* note 108, at 266, a total of 4334 wiretaps (957 federal and 3377 state) were conducted between 1968 and 1974.

115. Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146. (Title II is codified at 18 U.S.C. § 891-96 (1982)).

116. See S. 5, 90th Cong., 1st Sess., 114 CONG. REC. 2550 (1968), later enacted as Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146. (Title II is codified at 18 U.S.C. §§ 891-96 (1982)).

117. See 114 CONG. REC. 14391 (1968) (remarks of Congressmen Poff and McDade).

118. Consumer Credit Protection Act, *supra* note 111, Title II § 201(a) (emphasis added).

119. 114 Cong. Rec. 14391 (1968) (remarks of Congressman McDade).

120. N.Y. Times, Jan. 28, 1968, § VI, at 19, *reprinted in* 114 CONG. REC. 1428-31 (1968).

121. *Perez v. United States*, 402 U.S. 146, 147 (1971).

ally is, a very mobile, individual operation.<sup>122</sup> There was no indication in Congress as to why the government should be excused from proving the jurisdictional element in each loan-sharking case, just as it had to do in cases under all previously enacted statutes. The true consideration behind this, though it does not appear in the legislative history, is that in any given case it is virtually impossible to prove any effect on interstate commerce because no meaningful impact actually exists.

As with past expansions of federal authority, in the case of loan-sharking the need for federal legislation was due to the states' lack of will to enforce their extortion laws, not their lack of jurisdictional authority. But this legislation differs from past legislation in that the peculiarly *local* nature of loan-sharking led to a statute where the interstate connection need not (because it generally could not) be proven. The decision in *Perez* culminated the trend begun by *Champion v. Ames*<sup>123</sup> of expanding the federal police power to its limit. Recent Supreme Court decisions in *United States v. Lopez*<sup>124</sup> and *United States v. Morrison*<sup>125</sup> seemed to indicate that the Court was ready to curb Congress's power in this area. While citing *Perez* with approval, both cases overturned federal criminal statutes and limited federal jurisdiction under the commerce clause to regulation of "commercial activity" and the "channels and instrumentalities of commerce." Despite this ostensible limitation, no federal organized crime statutes have been struck down by application of the reasoning in *Morrison* or *Lopez*.<sup>126</sup> Furthermore, the Court's recent decision in the "medical marijuana" case *Gonzalez v. Raich*,<sup>127</sup> put to rest any doubts about the continuing viability of *Perez* and suggested that the Court will not seriously interfere with the expansion of federal police power under the commerce clause when it is packaged as part of the fight against the scourges of organized crime, narcotics or terrorism.

## V. THE PRESENT. . . AND THE FUTURE

Despite the accumulation of federal power since the Lottery Act, the Assistant Attorney General (Criminal Division) candidly admitted before a House committee in 1968 that there was "no way of gaug-

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122. *Impact of Crime on Small Business, 1968: Hearings before the Select Committee on Small Business, United States Senate*, 90th Cong., 2d Sess., 4 (1968). (testimony of Ralph Salerno). Salerno testified that federal legislation was needed because loan sharks, unlike gamblers, were hard to catch as a result of their lack of organization.

123. 188 U.S. 321 (1903).

124. *United States v. Morrison*, 529 U.S. 598 (2000).

125. *United States v. Lopez*, 514 U.S. 549 (1995).

126. See, C. Bradley, *Federalism and Federal Criminal Law*, 55 *Hastings L. J.* 573, 581(2004) for a discussion of the (non) impact of these cases on federal criminal law enforcement.

127. *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).



ing" whether organized crime was increasing or decreasing.<sup>128</sup> The committee concluded that, although the government possesses a "wealth of weapons" to fight organized crime<sup>129</sup> the efforts to cut the growth of organized crime had failed due, not to the lack of legislative authority but to the lack of coordination among the many agencies with responsibilities in the area.<sup>130</sup>

In November of 1968, Richard Nixon was elected to the Presidency in a campaign that emphasized "law and order" after public fear of crime and disorder had been stirred by summer riots in the country's black ghettos. While there was no reason to directly associate this problem with organized crime, the Justice Department believed that the time was ripe for obtaining additional legislative authority from Congress. Shortly after his inauguration, the President ordered the Attorney General to engage in wiretapping of organized racketeers,<sup>131</sup> asked Congress to double (up to \$61 million) the amount spent in fighting organized crime, and proposed new legislation which would give the Justice Department immunity power, amend the wagering tax statutes, make local corruption a federal crime, cut off gambling income, and prevent the infiltration of legitimate businesses by organized crime.<sup>132</sup>

This proposal represented a presidential imprimatur on legislation already introduced on January 15, 1969 by Senator McClellan.<sup>133</sup> This bill (S. 30) contained eight titles pertinent to the problem of organized crime. Title I provided for special grand juries to investigate organized crime.<sup>134</sup> Title II was an immunity statute giving the Justice Department the power to immunize witnesses in the investigation of *any* federal crime.<sup>135</sup> Title III provided for confinement, without bail (for as long as the grand jury was in session) of any witness who refused to testify before a federal grand jury "without just cause."<sup>136</sup> Title IV provided penalties for false statement before the grand jury.<sup>137</sup> Title V provided for the taking of depositions and the use of such depositions at trial if the witness was unavailable.<sup>138</sup> Ti-

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128. FEDERAL EFFORT AGAINST ORGANIZED CRIME: REPORT OF AGENCY OPERATIONS, H.R. REP. No. 1574, 90th Cong., 2nd Sess. 29 (1968) [hereinafter cited as FEDERAL EFFORT AGAINST ORGANIZED CRIME].

129. *Id.* at 75.

130. *Id.*

131. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATIVE TO THE FIGHT AGAINST ORGANIZED CRIME, H.R. DOC. No. 105, 91st Cong., 1st Sess. 2 (1969).

132. *Id.* at 5-6.

133. S. 30, 90th Cong., 2d Sess., 115 CONG. REC. 829-32 (1969).

134. S. 30, §§ 101-105 (1969). *Id.* at 829-30 (current version at 18 U.S.C. §§ 3331-3334).

135. S. 30, §§ 201-202 (1969). *Id.* at 830 (current version at 18 U.S.C. §§ 6001-6005). As such, the immunity statute was far broader than any previously proposed.

136. S. 30, § 301 (1969). *Id.* at 830 (current version at 28 U.S.C. § 1826).

137. S. 30, § 401 (1969). *Id.* at 830 (current version at 18 U.S.C. § 1623).

138. S. 30, § 501 (1969). *Id.* at 830 (current version at 18 U.S.C. § 3503). As enacted, this procedure is now available to any party.

tle VI provided protected facilities for housing government witnesses.<sup>139</sup> Title VII provided for the admissibility of the statements of coconspirators in federal trials.<sup>140</sup> Title VIII provided for enhanced sentences for "dangerous special offenders."<sup>141</sup>

The bills survived extensive hearings at which the Attorney General offered the usual observations: "Organized crime poses a serious threat to our form of government and our system of criminal justice, but "I am happy to report that we have made significant progress on many fronts."<sup>142</sup> They were adopted with numerous although relatively minor changes.<sup>143</sup> Bills prohibiting "gambling businesses"<sup>144</sup> and mob infiltration into legitimate business (RICO)<sup>145</sup> were also incorporated into S. 30 and passed by an overwhelming vote.<sup>146</sup>

The Act provided another tremendous boost to the federal law enforcement effort, particularly the two new substantive crimes under RICO<sup>147</sup> and the gambling business prohibition.<sup>148</sup> Moreover, the government's ability to conduct grand jury investigations in organized crime and public corruption cases was greatly enhanced by the immunity, contempt, and witness protection statutes. As before, these broad statutes aimed at organized crime have been used in all

139. S. 30, § 601 (1969). *Id.* at 831 (current version at 18 U.S.C. § 3481).

140. S. 30, § 701 (1969). *Id.* at 831. This title was amended to become the current 18 U.S.C. § 3504).

141. S. 30, § 801 (1969). *Id.* at 831-32 (current version at 18 U.S.C. §§ 3575-78). This became Title X of the final Act. S. 30 also contained a Title IX which provided that if any portion of the Act was held invalid, the other portions would not be affected. *Id.* at 832.

142. *Organized Crime Control: Hearings before Subcomm. No. 5 of the Comm. On the Judiciary, House of Representatives*, 91st Cong., 2d Sess. 153 (1970).

143. *See Measures Relating to Organized Crime: Hearings before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, United States Senate*, 91st Cong., 1st Sess. 365-77(1969) (Department of Justice Comments on S. 30) [hereinafter referred to as *Hearings on Measures*].

144. *See* S. 2022 in *Hearings on Measures, Id.*, at 83.

145. *See* S. 1623 and S. 1861 in *Hearings on Measures, Id.*, at 37 & 61. *See* C. Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980) (discussing more fully legislative history of this particularly significant provision) [hereinafter cited as Bradley].

146. *Organized Crime Control Act of 1970*, Pub. L. No. 91-452, 84 Stat. 937 (1970). The Senate vote was 73 to 1. McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55 (1970).

147. RICO (Racketeer Influenced and Corrupt Organization), 18 U.S.C. §§ 1961-1968, prohibits the acquisition of any enterprise through the investment of racketeering proceeds, 18 U.S.C. § 1962(a), as well as the acquisition or operation of an enterprise through a pattern of racketeering activities, 18 U.S.C. § 1962(b) (c). In addition to a 20 year sentence for the violation of any of the RICO subsections, the statute also provides for forfeiture of the "racketeers'" interest in the enterprise, 18 U.S.C. § 1963 (1982). *See* Bradley, *supra* note 143, for a detailed analysis of the criminal provisions of RICO. RICO also provides for civil remedies for RICO violations. 18 U.S.C. § 1964. *See* Blakey, *The RICO Civil Fraud in Context: Reflections on Bennet v. Berg*, 58 NOTRE DAME LAW. 237 (1982).

148. 18 U.S.C. § 1955 makes the conducting, managing, or general operating of a gambling business (involving five or more persons) a federal crime without requiring any impact on interstate commerce.

manner of cases, most of which have nothing to do with the problem of organized crime. RICO, originally aimed at stopping infiltration of organized crime into legitimate business, has been used to prosecute defendants who committed three robberies,<sup>149</sup> a defendant who defrauded Medicare through his hospital supply business,<sup>150</sup> and a group which operated a "weekend dice and card game" in a trailer park.<sup>151</sup> RICO has virtually never been used in a case which was not reachable by other statutes, and has been used much more extensively as a tool for civil litigation than for criminal prosecution of racketeers. In all these cases, the courts have upheld federal jurisdiction, sometimes exhibiting the same patriotic zeal displayed years before in *Champion v. Ames*.<sup>152</sup>

At the same time, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970, providing for severe penalties for certain drug violations. In the case of a "continuing series of violations" of federal drug laws, undertaken by a person who holds a position of authority over at least five other people, a first violation can result in 20 years imprisonment and a fine of \$2,000,000. The statute also authorizes life imprisonment in the case of a violator who is the leader of a large scale drug organization.<sup>153</sup>

Despite this possibly unnecessary expansion of the federal government's powers, there is no evidence that it has been used other than to prosecute genuinely criminal behavior. This was not true of the Justice Department's use of the broad new powers conferred by the immunity statute which, by authorizing immunization from prosecution, allowed the government to coerce grand jury testimony by neutralizing Fifth Amendment claims.<sup>154</sup> This power carries great potential for harassment and intimidation of people whom the government does not like. For example, the Nixon administration used the new powers to persecute anti-war and anti-Nixon protesters.<sup>155</sup>

Given the vast new powers provided by the 1970 Act, the broad view the Justice Department was taking of these powers, and the

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149. *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

150. *United States v. Huber*, 603 F.2d 387 (2nd Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

151. *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978).

152. E.g. *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978). Circuit Judge Simpson stated that, "In this case we deal with the question of whether and, if so, how a free society can protect itself when groups of people, through division of labor, specialization, diversification, complexity of organization and the accumulation of capital, turn crime into an ongoing business." *Id.* at 884.

153. 21 U.S.C. § 848, 84 Stat. 1236.

154. See *supra* note 131 and accompanying text.

155. *Hearings on H.R.J. Res. 46, H.R. 1277 and Related Bills: Federal Grand Jury before the House Committee on the Judiciary, Subcommittee on Immigration, Citizenship and International Law*, 94th Cong., 2d Sess. 213 (1976)

permissive attitude of the courts, it would have seemed that the federal army would at last have been prepared to smite the enemy a deadly blow. Of course, that did not happen. A 1977 study by the General Accounting Office (GAO) entitled *WAR ON ORGANIZED CRIME FALTERING* attributed the failure of the government to make significant inroads to three principal factors: 1) consumer demand for organized crime's goods and services provide it with billions of dollars each year; 2) federal work against organized crime is not planned, organized or directed efficiently; and, 3) most convictions obtained by strike forces have resulted in no prison sentences or sentences of less than two years.<sup>156</sup> Equally important, the GAO found that "[t]here is no agreement on what organized crime is and, consequently, on precisely whom or what the Government is fighting."<sup>157</sup>

As to the first point, certainly a major reason for the failure of the law enforcement effort against organized crime is that people do not really want it to succeed. A strenuous law enforcement crack-down might drive up the price of gambling, prostitution or narcotics, but it is inconceivable that these sources of organized crime income could be eliminated unless demand disappears. However, this is not necessarily true of such organized criminal activities as labor racketeering and the "protection" racket which are crimes with victims and consequently more amenable to elimination.

The second point, lack of coordination of the federal effort, reflects the age old conflicts between bureaucratic agencies struggling for power — in this case, the FBI, the Organized Crime Section of the Justice Department, the IRS, the DEA and other enforcement agencies. To some extent this problem has been alleviated by Justice Department efforts.<sup>158</sup> The third point, few long prison sentences, almost surely was indicative of the quality of the cases rather than the leniency of the judges. There is a natural tendency to convict somebody once an investigation has begun, even if the person is not a significant figure.

The final point, lack of consistent definition of organized crime, has enabled the Justice Department to portray the anti-organized crime effort as either failing or succeeding depending on the Department's purposes. Now, the definition of an "organized crime case" is simply a case which is opened under a statute that the FBI considers to be an "organized crime statute," such as ITAR or RICO. Conse-

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156. REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES, *WAR ON ORGANIZED CRIME FALTERING — FEDERAL STRIKE FORCES NOT GETTING THE JOB DONE* (1977).

157. *Id.* at *i* (1981).

158. See REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, *STRONGER FEDERAL EFFORT NEEDED IN FIGHT AGAINST ORGANIZED CRIME* 7-9 (1981) (follow-up to 1977 study finding various "management techniques" have "added to the effectiveness of the program to fight organized crime").

quently, many of the convictions in "organized crime cases" do not involve organized crime personnel at all, but, as discussed previously, "everyday" criminals who have fallen within the broad sweep of the legislation.<sup>159</sup>

Despite the purported failure of Congress and law enforcement in this area, or perhaps in part because of it, attention on the organized crime problem has significantly decreased over the last twenty years. The most recent organized crime statute, the Continuing Financial Crimes Enterprise Act, was passed in 1990.<sup>160</sup>

Although the government's advancement of the federalization of crime has been by no means an entirely unfortunate development, the monolithic character of the single Justice Department effort compared to the more feeble attempts of the fifty states carries potentially dangerous consequences. The Justice Department compiles the statistics that define the problem, investigates and prosecutes the cases, urges broad interpretation of statutory authority on the courts and proposes new legislative authority to Congress. Yet, as was discussed, the only means the Justice Department has for measuring "the problem" is by attempting to measure the number of investigations, indictments or convictions in "organized crime cases," which are unhelpfully defined as cases opened under organized crime statutes — the statutes discussed in this article. The flaw in this technique is immediately apparent: as the number of statutes increases, the number of violations increases by definition. Thus, it is not inconsistent for the Justice Department to report ever greater success against organized crime and at the same time complain that the problem is growing. No one knows how much the number of criminals has grown or shrunk because the definitions keep changing. Whatever the actual numbers may be, this phenomenon will operate to make it seem to be growing faster than it is.

What is at work is a complicated version of Parkinson's Law as to a bureaucracy's tendency to perpetuate itself.<sup>161</sup> The Justice Department identifies a problem and presses Congress for more legislative authority. More legislative authority naturally requires more man-

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159. Telephone interview of FBI official by author, August 1983. As of 1976, the Justice Department had a definition of organized crime but it was too vague to be of use in compiling statistics: "Organized crime includes any group of individuals whose primary activity involves violating criminal laws to seek illegal profits and power by engaging in racketeering activities and, when appropriate, engaging in intricate financial manipulations." NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON ORGANIZED CRIME 213, app. 1(1976).

160. The CFCE provides for penalties of at least 10 years and as much as life in prison for persons who commit a series of violations of other statutes, if such violations affect a financial institution. 18 U.S.C. § 225.

161. C. PARKINSON, PARKINSON'S LAW (1957). Parkinson demonstrates that the growth of a bureaucracy has no connection to the actual subject matter with which it has to deal.

power and funds, which are also approved. These new agents and prosecutors zealously sally forth and make more cases against "racketeers," i.e., people who violate the new statutes. And then it is discovered, much to the consternation of all concerned, that there are more racketeers than ever. The solution? More legislative authority.

This model remains accurate despite the current lack of public attention to organized crime. During the past two decades, the fight against organized crime has been replaced by the war on terror as law enforcement's top priority.<sup>162</sup> This tendency of a bureaucracy to perpetuate itself is also evident within this framework. The Defense Department and the newly created Department of Homeland Security depend for their continued prosperity upon the public's perception that a problem—the threat of the terrorism—is worse than ever, regardless of what the truth may be.

But there is more to the organized crime phenomenon than simply a bureaucracy's tendency to expand. As noted, the early growth of federal power in this area came from congressional initiative. In recent years, the political appointees in the executive branch have led the fight against organized crime, sometimes without the support of the FBI bureaucracy. Congress, however, has been a highly cooperative partner, as has the U.S. Supreme Court. This peculiar harmony among the three branches of government is both unique and disturbing, for it indicates that the traditional system of checks and balances has broken down. This might not be troublesome if the result had been the eradication of organized crime. But, in light of the fact that organized crime has not been eradicated and that the federal power thus acquired is not used primarily against organized crime figures, has this great build-up of federal power been appropriate?

In the future, Justice Department descriptions of the scope of the problem and the need for new authority should be treated with considerably more skepticism than they have been in the past. The natural tendency of the Justice Department bureaucracy to increase and multiply in both size and power must be factored into any future decisions concerning legislation or funding.

When Congress does agree to draft organized crime legislation, the statutes should be narrowly drawn to focus directly on the problem rather than depending on prosecutors to impose limits on themselves. In fact, in the author's view, the Department has more than ample legislative authority, and Congress should consider scaling back this authority somewhat; for example, by narrowing the scope of RICO to cases that really do involve organized criminals or, if this cannot be done, by abolishing RICO altogether. Similarly, wiretapping authority, the most intrusive of all current federal powers,

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162. At [www.cnn.com/2004/ALLPOLITICS/10/10/bush.kerry.terror/index.html](http://www.cnn.com/2004/ALLPOLITICS/10/10/bush.kerry.terror/index.html)

should be limited, as was originally proposed, to investigations of only the most serious violations, rather than to virtually all cases, as was finally enacted. Finally, Congress should recognize that just as changing circumstances may require the granting of new powers, so too should consideration be given to the curtailing of old powers which are no longer needed or were unwisely granted in the first place. To date, no grant of statutory authority to the Justice Department in the racketeering area has ever been revoked or limited.

This article has demonstrated the ability of the federal government to greatly expand its power to deal with a threat which, though it excites the popular imagination, is not as grave or as immediate as other threats that could readily be imagined. As mentioned, this ability to expand federal power also exists in other areas.<sup>163</sup> If the organized crime experience is a reliable model, it is likely that greater concentration of power in the hands of the Justice Department and the Department of Homeland Security, and the commensurate reductions in civil liberties, will continue. In the future, it must be recognized that the DOJ and DHS's assessments and the statistics they will present to support it are colored by the assumption that the best way to deal with any law enforcement problem is to give more power to the federal law enforcement authorities. Blind acceptance of this assumption by the Congress and public, as has repeatedly occurred in the past, would be a mistake.

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163. *Hamdi v. Rumsfeld*, 124 S. CT. 981 (2004) (discussing the question of whether the Executive has the authority to detain citizens who qualify as "enemy combatants", and what process is "constitutionally due to a citizen who disputes his enemy-combatant status"). *See also* U.S.A. Patriot Act, Title II. (Enhanced Surveillance Procedures).